In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1594

ANTHONY SALVAGGIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of perjury in violation of 18 U.S.C. 1621. He was sentenced to five years' imprisonment. The sentence was suspended and he was placed on probation for five years. The court of appeals affirmed without an opinion and on May 8, 1972, denied a petition for rehearing. The petition for a writ of certiorari was not filed until June 8, 1972, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no merit to the contentions raised by petitioner.

471-439—72

On November 13, 1970, petitioner was called before a "One-Man Grand Jury" investigation being conducted in Connecticut by state authorities (Tr. 11).[1] On December 16, 1970, petitioner instituted a civil suit in the United States District Court for the District of Connecticut seeking a temporary and permanent injunction to restrain state officials from administering and enforcing the "One-Man Grand Jury" statutes (Tr. 7–8), and to have the Connecticut statutes declared unconstitutional. He requested further that a three-judge court be convened to resolve these issues and that a temporary restraining order be issued to avoid irreparable damage to him (Tr. 8; GX. 1).

On January 11, 1971, a hearing was held in the district court on petitioner's civil suit which was ultimately dismissed. *Salvaggio* v. *Cotter,* 324 F. Supp. 681 (D. Conn.), affirmed *per curiam,* 447 F. 2d 1406 (C.A. 2). The perjury charge arose from testimony petitioner gave at this hearing under oath. Petitioner testified at the hearing that as a result of his appearance before the one-man grand jury and the resultant publicity in the Bridgeport newspapers, he was refused credit at the Mechanics and Farmers Savings Bank in Bridgeport, Connecticut (Tr. 11–17). He further testified that Mr. Honrath, the Assistant Vice-President and Operations Officer of the Mortgage Department of Mechanics and Farmers Savings Bank,

[1] "Tr." refers to the trial transcript which we are lodging with the Clerk of this Court. "GX." refers to the government's exhibits at trial, and "DX." refers to the defendants' exhibits.

told him in the early part of December 1970 in a "roundabout way" that the bank was denying his mortgage applications because of his appearance before the grand jury and the publicity petitioner received in the newspapers due to his appearance (Tr. 12–17).

At petitioner's trial for perjury, Mr. Honrath testified that at absolutely no time in December 1970 did he tell petitioner that the bank was going to deny him mortgages and that he did not talk with petitioner about the appearance of his name in the Bridgeport papers (Tr. 28–30). The bank officer also testified that the two mortgage applications made by petitioner in December 1970 were processed by the bank that month and were subsequently approved by the real estate committee on January 5, 1971 (Tr. 26–27).

Miss Fasanella, a secretary in the Mortgage Department of the bank, testified that petitioner's mortgage applications reflected that they had been approved on January 5, 1971, by the committee and that the initials of two officers appeared on them (Tr. 66–67; DXs. D and E). Miss Fasanella further testified that she prepared a mortgage commitment letter addressed to petitioner on January 7, 1971, which was signed by Mr. Honrath and taken by her to the mail room that day (Tr. 69–70; GX. 6).[2] Miss Fasanella also testified that in connection with the mortgages she prepared a

[2] The letter was addressed to Anthony S. Salvaggio, 1241 Brooklawn Avenue, Fairfield, Connecticut (Tr. 69). Miss Fasanella testified that it was the bank's practice that when mail was left in the mail room it would be stamped and taken to the Post Office every day (Tr. 71).

search order addressed to attorney Raymond Lyddy on January 7, 1971 (Tr. 71–72; GX. 7).

Mr. Lyddy testified that he represented petitioner in connection with the mortgage applications and had received the search order and a copy of the mortgage commitment from the Mechanics and Farmers Savings Bank (Tr. 97–98).

1. Petitioner argues that the testimony he offered at the hearing in the civil suit was not material to that suit and, therefore, his conviction should be reversed (Pet. 6–9). He contends in this connection that the district court was required to decide only a jurisdictional question which involved no question of fact (Pet. 7). In passing upon petitioner's claim that the state proceedings had caused irreparable injury to his reputation and credit standing, however, the district court of necessity was required to assess the testimony of petitioner that denial of real estate mortgages due to unfavorable publicity stemmed from his grand jury appearance.[3] Petitioner's testimony therefore was material to the substantiality of his complaint. See *Younger* v. *Harris*, 401 U.S. 37, 43–49; *Landry* v. *Daley*, 280 F. Supp. 929, 935 (N.D. Ill); *United States* v. *Manfredonia*, 414 F. 2d 760 (C.A. 2).

2. Petitioner contends, as he did below, that the

[3] In dismissing petitioner's civil action on the grounds that petitioner's claims were without merit on their face and that the court was without jurisdiction to grant the requested relief, the district court pointed out that as "material proof of irreparable harm," petitioner claimed that his credit rating had been harmed by virtue of the state proceedings to the extent that he had been denied a real estate mortgage. *Salvaggio* v. *Cotter*, *supra*, 324 F. Supp. at 687.

evidence was insufficient since it did not satisfy the "two witness rule" necessary for a perjury conviction (Pet. 9–12). This claim has no merit. Perjury can be proved by two witnesses or by the testimony of one witness corroborated by independent evidence. *Weiler* v. *United States*, 323 U.S. 606; *United States* v. *Cohn*, 452 F. 2d 881 (C.A. 2), certiorari denied, 405 U.S. 975; *Manfredonia, supra; United States* v. *Marchisio*, 344 F. 2d 653 (C.A. 2). Mr. Honrath's testimony was sufficiently corroborated by the testimony of Miss Fasanella and Mr. Lyddy and the bank records, which showed that in fact petitioner was not refused credit by Mechanics and Farmers Savings Bank and was not denied his mortgage requests (GXs. 6, 7; DXs. D & E). The fact that Mr. Lyddy testified that the bank documents were not brought to his attention until January 11, 1971, does not militate against the relevancy of his testimony which tended to confirm the testimony of the bank personnel that a firm mortgage commitment had been issued and mailed on January 7, 1971.

3. After the trial judge completed his instructions to the jury, he asked counsel in open court to answer "yes" or "no" as to whether they had any exceptions to his charge (Tr. 314). Petitioner's counsel said "no"; the jury then retired to deliberate their verdict (Tr. 314–315). Petitioner urges (Pet. 12–13) that the trial court committed prejudicial error in asking counsel to object to the instructions in the presence of the jury. Petitioner has not shown that he was prejudiced by this procedure, since he has

failed to show that he intended to make any objections. Nor is there anything to show that the fact that the jury heard petitioner's counsel express his satisfaction with the charge harmed petitioner's case.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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[4] In the related situation where there has been a violation of the requirements of Rule 30, Fed. R. Crim. P., that counsel be given an opportunity to object to proposed instructions outside the presence of the jury, the courts of appeals are not in total agreement. Those that have been presented with the issue, except for the Tenth Circuit (see *Hall* v. *United States*, 378 F. 2d 349), have held that a breach of this provision does not constitute reversible error *per se*. See, *e.g.*, *United States* v. *Schartner*, 426 F. 2d 470, 478–480 (C.A. 3), and cases there cited; *United States* v. *Titus*, 221 F. 2d 571, 573–574 (C.A. 2), certiorari denied, 350 U.S. 832. This Court has recently refused to settle this disagreement, *Goodman* v. *United States*, No. 71–6402, certiorari denied, May 30, 1972. There is no reason to take a different approach in the present case.

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